

IN THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA  
AT CHARLESTON

TRANSCRIPT OF PROCEEDINGS

-----X  
:  
UNITED STATES OF AMERICA, : CRIMINAL ACTION  
:  
vs. : NO. 2:14-CR-00113-01  
:  
JAMES H. EVANS, III, : August 5, 2014  
:  
Defendant. :  
:  
-----X

PLEA HEARING

BEFORE THE HONORABLE THOMAS E. JOHNSTON  
UNITED STATES DISTRICT JUDGE

APPEARANCES:

For the United States: MS. MEREDITH GEORGE THOMAS  
Assistant U.S. Attorney  
300 Virginia Street, East  
Charleston, WV 25301

For the Defendant: MR. ROBERT B. KUENZEL  
Kuenzel & Associates  
P.O. Box 607  
Chapmanville, WV 25508

Court Reporter: Lisa A. Cook, RPR-RMR-CRR-FCRR

Proceedings recorded by mechanical stenography; transcript  
produced by computer.

P R O C E E D I N G S

THE CLERK: The matter before the Court is the  
*United States vs. James Evans*, Criminal Action Number  
2:14-CR-00113, scheduled for a plea hearing.

THE COURT: Good afternoon. Will counsel please  
note their appearances.

MS. THOMAS: Meredith Thomas on behalf of the  
United States.

MR. KUENZEL: Rob Kuenzel on behalf of the  
defendant, James Evans, who is also present, Your Honor.

THE COURT: Good afternoon.

Mr. Evans, would you please stand and I'll ask the  
deputy clerk to administer an oath to you at this time.

(Defendant sworn)

THE COURT: You may be seated.

MR. KUENZEL: Judge, let me first apologize for  
being tardy. There was a crash out here on the bridge  
coming across the river. So, that's why we were late.

THE COURT: I understand that. I appreciate that.  
It happens from time to time.

Mr. Evans, do you understand that you're now under oath  
and you must tell the truth and if you testify falsely, you  
may face prosecution for perjury or for making a false  
statement?

THE DEFENDANT: Yes, sir.

1           THE COURT: All right. Throughout the course of  
2 this hearing, I'm going to be asking you a number of  
3 questions and I want to make sure that you and I are  
4 communicating clearly. So, if at any time you don't  
5 understand a question that I ask or anything else that  
6 occurs in this hearing, I want you to feel free to speak up  
7 and seek clarification.

8           Also, if at any time you need to confer with your  
9 attorney, I'll be pleased to pause the proceedings to allow  
10 you to do so.

11          Do you understand all that?

12           THE DEFENDANT: I do, sir.

13           THE COURT: All right. Let me begin by asking you  
14 how old are you?

15           THE DEFENDANT: Thirty-nine.

16           THE COURT: Can you briefly describe your  
17 educational background?

18           THE DEFENDANT: High school educated.

19           THE COURT: And can you read and write and  
20 understand the English language?

21           THE DEFENDANT: Yes, sir.

22           THE COURT: Any hesitation about that?

23           THE DEFENDANT: No, sir.

24           THE COURT: All right. Can you briefly describe  
25 your work experience?

1           THE DEFENDANT: My -- I work for myself. I own a  
2 salvage yard that I once worked for and now own.

3           THE COURT: All right. Have you taken any  
4 medicine or drugs or consumed any alcoholic beverages in the  
5 last 24 hours?

6           THE DEFENDANT: Yes, sir. I take medicine. I was  
7 actually at the hospital last night.

8           THE COURT: Prescription medication?

9           THE DEFENDANT: Yes, sir.

10          THE COURT: And what is that?

11          THE DEFENDANT: I know I've taken some Xanax this  
12 morning. And I don't know what they gave me last night.

13          THE COURT: What, what did they give you medicine  
14 for last night?

15          THE DEFENDANT: Shortness of breath, a bad  
16 headache, just high blood pressure, that kind of stuff.

17          THE COURT: Okay. And you took Xanax this  
18 morning?

19          THE DEFENDANT: Yes, sir.

20          THE COURT: All right. Any other prescription  
21 medications?

22          THE DEFENDANT: No, sir.

23          THE COURT: To the best of your knowledge, as you  
24 sit here today are you suffering from any side effects from  
25 any of the medications you've taken that would in any way

1 affect your ability to fully participate in this hearing  
2 today?

3 THE DEFENDANT: No, sir.

4 THE COURT: Now, have you ever been treated for  
5 any mental illness or addiction to drugs of any kind?

6 THE DEFENDANT: No, sir.

7 THE COURT: Do you know where you are and why  
8 you're here today?

9 THE DEFENDANT: Yes, sir.

10 THE COURT: Do you have any hearing impairment or  
11 other disability which would prevent you from fully  
12 participating in this hearing today?

13 THE DEFENDANT: No, sir.

14 THE COURT: Mr. Kuenzel, do you have any reason to  
15 question the competence of your client?

16 MR. KUENZEL: No, Your Honor.

17 THE COURT: All right. I believe I've been  
18 provided with the original of the plea agreement.

19 Ms. Thomas, is this -- have there been any changes made  
20 to the plea agreement since the copy I received earlier?

21 MS. THOMAS: No, Your Honor.

22 THE COURT: All right. Very well.

23 Mr. Evans, is that your signature which appears on the  
24 8th and final page of the plea agreement?

25 THE DEFENDANT: Yes, sir.

1           THE COURT: And are those your initials that  
2 appear on the other pages of the plea agreement?

3           THE DEFENDANT: Yes, sir.

4           THE COURT: And have you read and reviewed each of  
5 the 16 paragraphs of the plea agreement and the two exhibits  
6 attached thereto?

7           Let me ask that question again. Have you read and  
8 reviewed with your attorney each of the 16 paragraphs of the  
9 plea agreement and the exhibit attached to -- the exhibits  
10 attached to the plea agreement?

11          THE DEFENDANT: Yes, Your Honor.

12          THE COURT: All right. Just for the record, I  
13 would note that there's 17 numbered and one of them -- well,  
14 we skipped number 12, so there's actually only 16 paragraphs  
15 in the, in the plea agreement.

16          And do you wish to have the various terms of the plea  
17 agreement orally stated on the record or do you believe that  
18 that's unnecessary?

19          MR. KUENZEL: Judge, we respectfully would waive  
20 the reading of the plea agreement.

21          THE COURT: All right. But let me ask the  
22 defendant.

23          MR. KUENZEL: Yes, Your Honor.

24          THE COURT: I'll ask you again. Mr. Evans, do you  
25 wish to have the various terms of the plea agreement orally

1     stated on the record or do you believe that that's  
2     unnecessary?

3             THE DEFENDANT:   I think that's unnecessary, Your  
4     Honor.

5             THE COURT:   All right.   And do you understand and  
6     agree with all of the terms and provisions contained in the  
7     plea agreement?

8             THE DEFENDANT:   Yes, Your Honor.

9             THE COURT:   All right.

10            Mr. Kuenzel, have you reviewed each of the 16  
11     paragraphs of the plea agreement and its exhibits with your  
12     client?

13            MR. KUENZEL:   I have, Your Honor.

14            THE COURT:   And, Mr. Kuenzel and Ms. Thomas, is  
15     there any reason why either of you believe that the various  
16     terms of the plea agreement should be orally stated on the  
17     record?

18            MS. THOMAS:   No, Your Honor.

19            MR. KUENZEL:   No, Your Honor.

20            THE COURT:   All right.   Nonetheless, Mr. Evans, I  
21     want to talk with you about some of the provisions of the  
22     plea agreement beginning with Section 5 which begins on Page  
23     2 and runs over on to Page 3 and is entitled "Restitution."

24            And it recites that you agree that you owe restitution  
25     to Arch Coal in the amount of \$30,000 with interest.   Do you

1 understand that?

2 THE DEFENDANT: Yes, sir.

3 THE COURT: And more to the point, I want to  
4 direct your attention to Subsection (e) of Section 5 and  
5 that is an appeal waiver. And, first of all, do you  
6 understand that a waiver is a legal term that means you're  
7 giving something up?

8 THE DEFENDANT: Could you -- I didn't quite  
9 understand that, sir.

10 THE COURT: Do you understand that a waiver is a  
11 legal term that means you're giving something up?

12 THE DEFENDANT: Yes.

13 THE COURT: Do you understand that?

14 THE DEFENDANT: Yes, yes, Your Honor.

15 THE COURT: All right. So, in Section 5(e) do you  
16 understand that you're waiving -- you waive your right to  
17 appeal any order of restitution imposed by the Court unless  
18 the amount of restitution imposed is more than what is  
19 recited in Section 5. Do you understand that waiver?

20 THE DEFENDANT: Yes, Your Honor.

21 THE COURT: All right. Next I want to refer you  
22 to Section 10 of the plea agreement which begins on Page 4  
23 and runs over on to Page 5 and is entitled "Stipulation of  
24 Facts and Waiver of Federal Rule of Evidence 410."

25 Now, this section relates to a couple of different



1 matters, the first of which is the Stipulation of Facts  
2 which is attached to the plea agreement as Exhibit B. And I  
3 want to turn your attention to that document now.

4 Exhibit B is a three-page document. And on the third  
5 page, is that your signature which appears there?

6 THE DEFENDANT: Yes, Your Honor.

7 THE COURT: And have you read the Stipulation of  
8 Facts?

9 THE DEFENDANT: Yes, Your Honor.

10 THE COURT: And do you agree that all of the facts  
11 contained within the stipulation are true?

12 THE DEFENDANT: Yes, Your Honor.

13 THE COURT: Any hesitation about that?

14 THE DEFENDANT: No, sir.

15 THE COURT: All right. A little bit about what  
16 will be happening from here on out. I'll be asking the  
17 probation officer to prepare a Pre-Sentence Investigation  
18 Report. That report will contain detailed, recommended  
19 factual findings regarding this offense and your background,  
20 among other things.

21 Ultimately at sentencing I will make factual findings  
22 based, at least in part, on the recommendations contained in  
23 the Pre-Sentence Report. And you and the Government have  
24 reached an agreement regarding certain facts contained in  
25 the stipulation, but I want you to understand that in this

1 process, neither the probation officer nor this Court are  
2 bound by that Stipulation of Facts.

3 Do you understand that?

4 THE DEFENDANT: Yes, Your Honor.

5 THE COURT: And do you further understand that if  
6 I make findings of fact at sentencing that are different  
7 from or inconsistent with the facts contained in the  
8 stipulation, you will still be bound by your guilty plea and  
9 would have no right to withdraw it? Do you understand that?

10 THE DEFENDANT: Yes, Your Honor.

11 THE COURT: All right. The other matter  
12 addressed, then, in Section 10 of the plea agreement is a  
13 waiver of Federal Rule of Evidence 410.

14 Now, Rule 410 generally provides that information or  
15 documents regarding plea negotiations, and this Stipulation  
16 of Facts would fall into that category, those things are  
17 generally not admissible at trial. In other words, the  
18 Government can't use that sort of thing against you at  
19 trial.

20 However, under this waiver, if you withdraw from the  
21 plea agreement or if it's no longer any good because you  
22 violated one or more of its terms and there is a subsequent  
23 trial, then the Government under the waiver would be allowed  
24 to present the Stipulation of Facts in its case in chief or  
25 for other purposes at that trial.

1 Do you understand that waiver?

2 THE DEFENDANT: Yes, sir, yes, Your Honor.

3 THE COURT: All right. Next I want to refer you  
4 to Section 11 of the plea agreement which appears on Page 5  
5 and is entitled "Agreement on Sentencing Guidelines."

6 Now, before we get into this, I want to ask you, has  
7 your attorney talked with you regarding the Federal  
8 Sentencing Guidelines and how they generally work?

9 THE DEFENDANT: Yes, Your Honor.

10 THE COURT: And has he shown you that chart in the  
11 back of the book?

12 THE DEFENDANT: Yes, Your Honor.

13 THE COURT: All right. Well, working from that  
14 chart, I want to have a similar discussion with you.

15 If you'll recall, on the left side of the chart there's  
16 a series of numbers that run from low to high as you go down  
17 the page, and those are offense levels. And the offense  
18 level is calculated by starting at the Base Offense Level,  
19 or a starting point. And then that can be adjusted upward  
20 or downward depending on the facts and circumstances of the  
21 case to arrive at an adjusted offense level. Then  
22 consideration is usually given to a reduction for acceptance  
23 of responsibility.

24 Has your attorney talked with you about that?

25 THE DEFENDANT: Yes, Your Honor.

1           THE COURT: And then at that point, you generally  
2 arrive at a Total Offense Level. Then you go up to the top  
3 of the chart and there are six criminal history categories.  
4 And you would fall into one of those depending on the number  
5 of points, if any, assigned to any prior convictions that  
6 you may have.

7           Then you combine the Criminal History Category with the  
8 Total Offense Level and arrive at a point in the chart that  
9 gives a range of months of imprisonment. Some parts of the  
10 chart allow for certain alternatives to imprisonment.

11           Do you understand all these things so far about the  
12 guidelines?

13           THE DEFENDANT: Yes, Your Honor.

14           THE COURT: All right. Once we arrive at a range  
15 of months of imprisonment, I have the authority to sentence  
16 you within that range, or I have the authority to sentence  
17 you outside of that range, either above it or below it under  
18 certain circumstances.

19           If I do that based on factors identified in the  
20 guidelines themselves, that's generally known as a  
21 departure. If I sentence you outside the guideline range,  
22 again above it or below it, based on factors outside of the  
23 guidelines, it's generally known as a variance.

24           Has your attorney explained all these things to you?

25           THE DEFENDANT: Yes, Your Honor.

1           THE COURT: And do you believe that you fully  
2 understand all these things that I've told you about the  
3 guidelines?

4           THE DEFENDANT: Yes, Your Honor.

5           THE COURT: All right. With that in mind, Section  
6 11 contains an agreement you've reached with the Government  
7 regarding the guidelines, one or more provisions of the  
8 guidelines.

9           Now, this is similar to the Stipulation of Facts in  
10 that the Pre-Sentence Report will also include a proposed  
11 guideline calculation. And I will make a sentence -- I will  
12 make sentencing guideline findings at sentencing based, at  
13 least in part, on the recommendations made by the probation  
14 officer.

15           So, again, some of the Stipulation of Facts, even  
16 though you've reached an agreement with the Government  
17 regarding one or more provisions of the guidelines, I want  
18 you to understand that in this process neither the probation  
19 officer nor this Court are bound by that agreement on the  
20 guidelines. Do you understand that?

21           THE DEFENDANT: Yes, Your Honor.

22           THE COURT: And do you further understand that if  
23 I make guideline findings at sentencing that are different  
24 from or inconsistent with this agreement on the guidelines,  
25 you will still be bound by your guilty plea and would have

1 no right to withdraw it? Do you understand that?

2 THE DEFENDANT: Yes, Your Honor.

3 THE COURT: All right. Next I want to refer you  
4 to Section 13 of the plea agreement which begins on Page 5  
5 and runs over on to Page 6. And it's entitled "Waiver of  
6 Appeal and Collateral Attack."

7 Now, this section relates to a couple of different  
8 procedures that I want to discuss with you briefly.

9 An appeal is a procedure by which a party to, to a case  
10 before a District Court like this one - and in a criminal  
11 case, it's often the defendant - goes to the Court of  
12 Appeals, or the next level up of the court system, and  
13 argues that certain errors or mistakes may have taken place  
14 in their criminal case before the District Court.

15 A collateral attack, which is sometimes referred to as  
16 a *habeas corpus* petition, is a separate civil case that a  
17 defendant may file after their criminal case is over in  
18 which they may also argue that certain errors or mistakes  
19 may have taken place in their criminal case before the  
20 District Court.

21 Now, do you understand those two procedures at least as  
22 I've briefly described them to you?

23 THE DEFENDANT: Yes, Your Honor.

24 THE COURT: All right. The other matter I want to  
25 talk with you about before we get into Section 12 is that

1 there are two phases to a criminal case. I want to explain  
2 those to you.

3 The first one is the phase in which guilt or innocence  
4 is determined. Sometimes that's by trial. Much more often  
5 it's by a guilty plea like what we're doing today. That  
6 phase of the case begins at the very beginning of the case  
7 and includes all proceedings up and until that determination  
8 is made, such as what we're doing today.

9 The next phase of the case is the penalty phase in  
10 which the penalty for the crime is determined, including a  
11 sentencing hearing at the conclusion of the case.

12 Now, do you understand the two phases of a criminal  
13 case as I've described them to you?

14 THE DEFENDANT: Yes, Your Honor.

15 THE COURT: All right. With all that in mind,  
16 then, the first paragraph of Section 13 contains an appeal  
17 waiver. I want to go over that with you now. Give me just  
18 a moment.

19 (Pause)

20 THE COURT: All right. In that paragraph -- in  
21 that first paragraph do you understand you waive your right  
22 to appeal your conviction and any sentence of imprisonment,  
23 fine, or term of supervised release or the manner in which  
24 the sentence was determined on any ground whatsoever with  
25 one exception? You may appeal any sentence that is greater

1     than the maximum penalty set forth by statute. Do you  
2     understand that waiver?

3             THE DEFENDANT: Yes, Your Honor.

4             THE COURT: Anything about it you don't understand  
5     or you have questions about?

6             THE DEFENDANT: No, Your Honor.

7             THE COURT: All right. In the second paragraph of  
8     Section 13, then, do you also understand that you may not  
9     file a later civil proceeding, sometimes referred to as a  
10    collateral attack or a *habeas corpus* petition, challenging  
11    your plea, conviction, or sentence? Do you understand that?

12            THE DEFENDANT: Yes, Your Honor.

13            THE COURT: All right. Any questions about that?

14            THE DEFENDANT: No, Your Honor.

15            THE COURT: All right. Finally, do you understand  
16    that you are in no event waiving your right to claim  
17    ineffective assistance of counsel either on appeal or by  
18    collateral attack?

19            THE DEFENDANT: I didn't quite understand that,  
20    Your Honor.

21            THE COURT: In spite of these waivers, you are not  
22    waiving your right to claim that your counsel was  
23    ineffective on appeal or in a collateral attack. Do you  
24    understand that?

25            THE DEFENDANT: Yes, Your Honor.



1           THE COURT: All right. Finally, I want to refer  
2 you to Section 14 of the plea agreement which is on Page 6  
3 and it's entitled "Waiver of FOIA and Privacy Right."

4           Now, this waiver means you can't go back after this  
5 case is over and seek documents or other information about  
6 the case from the Government even with a Freedom of  
7 Information Act request. Do you understand that waiver?

8           THE DEFENDANT: Yes, Your Honor.

9           THE COURT: Mr. Kuenzel, have you thoroughly  
10 reviewed the plea agreement with your client?

11          MR. KUENZEL: I have, Your Honor.

12          THE COURT: Do you believe that he fully  
13 understands the various terms and provisions of the plea  
14 agreement, including the waivers and other matters that I've  
15 gone over with him this afternoon?

16          MR. KUENZEL: I do, Your Honor.

17          THE COURT: And, Mr. Evans, have you reviewed the  
18 plea agreement in detail with your attorney?

19          THE DEFENDANT: Yes, Your Honor.

20          THE COURT: Do you believe that you've had  
21 adequate time to discuss your case fully with your attorney?

22          THE DEFENDANT: Yes, Your Honor.

23          THE COURT: Has your attorney answered any  
24 questions that you've had about your case?

25          THE DEFENDANT: Yes, Your Honor.

1           THE COURT: And, Mr. Kuenzel, during your  
2 representation of the defendant, has he been cooperative?

3           MR. KUENZEL: He has, Your Honor.

4           THE COURT: Mr. Evans, has anything further been  
5 agreed to either orally or in writing that is not contained  
6 in the plea agreement?

7           THE DEFENDANT: No, Your Honor.

8           THE COURT: All right. I'll order that the plea  
9 agreement be filed. I'll find that the defendant  
10 understands and agrees with the terms contained in the plea  
11 agreement. I will defer accepting or rejecting the plea  
12 agreement until sentencing after the Pre-Sentence Report has  
13 been received and considered.

14          Now, Mr. Evans, have you received and read and reviewed  
15 with your attorney a copy of the information, or charging  
16 document, in this case?

17          THE DEFENDANT: Yes, Your Honor.

18          THE COURT: And do you understand the charge  
19 contained in the information?

20          THE DEFENDANT: Yes, Your Honor.

21          THE COURT: Would you like me to read the  
22 information to you or will you waive the reading of the  
23 information?

24          THE DEFENDANT: I'll waive the reading of the  
25 information, sir.

1           THE COURT: All right. As I understand it, you'll  
2 be pleading guilty to a single-count information which  
3 charges you with conspiracy to defraud Arch Coal of its  
4 right to the honest services of its employee in violation of  
5 18, U.S.C., Section 371. And I want to go over that statute  
6 and that charge with you in just a little bit more detail.

7           Section 371 provides in pertinent part that if two or  
8 more persons conspire either to commit any offense against  
9 the United States, or any agency thereof, and one or more of  
10 such persons do any act to effect the object of the  
11 conspiracy, each shall be guilty of a crime against the  
12 United States.

13          Now, you're charged with conspiring to violate 18,  
14 U.S.C., Section 1341, which is the mail fraud statute, and  
15 Section 1346.

16          And Section 1341 provides in pertinent part that  
17 whoever, having devised or intending to devise any scheme or  
18 artifice to defraud, or for obtaining money or property by  
19 means of false or fraudulent pretenses, representations, or  
20 promises, for the purpose of executing such scheme or  
21 artifice or attempting so to do, places in any post office  
22 or authorized depository for mail matter, any matter or  
23 thing whatever to be sent or delivered by the Postal  
24 Service, or deposits or causes to be deposited any matter or  
25 thing whatever to be sent or delivered by any private or

1 commercial interstate carrier, or takes or receives  
2 therefrom, any such matter or thing, or knowingly causes to  
3 be delivered by mail or such carrier according to the  
4 direction thereon, or at a place at which it is directed to  
5 be delivered by the person to whom it is addressed, any such  
6 matter or thing, shall be guilty of a crime against the  
7 United States.

8 Now, Section 1346 provides in pertinent part that the  
9 phrase "any scheme or artifice to defraud" includes any  
10 scheme or artifice to deprive another of the intangible  
11 right of honest services.

12 Now, in order to prove this charge, the Government  
13 would have to prove each of the following elements beyond a  
14 reasonable doubt:

15 And they are, first, that there was a conspiracy to  
16 defraud Arch Coal of its right to the honest services of its  
17 employee; and, second, the conspiracy was entered into by  
18 two or more persons; and, third, at some time during the  
19 conspiracy, a member of the conspiracy knowingly performed  
20 one of the overt acts charged in the information in order to  
21 advance the purpose of the conspiracy; and, finally, at some  
22 time during the conspiracy, you knew the purpose of the  
23 conspiracy and then deliberately joined the conspiracy.

24 Now, I want to share with you some definitions that  
25 apply to what I've just told you.

1       A criminal conspiracy is an agreement or a mutual  
2 understanding knowingly made or knowingly entered into by at  
3 least two people to violate the law by some joint or common  
4 plan or course of action.

5       An overt act means some type of outward, objective  
6 action performed by one of the parties to or one of the  
7 members of the agreement or conspiracy which evidences that  
8 agreement.

9       The phrase "any scheme or artifice to defraud" means  
10 any deliberate plan of action or course of conduct by which  
11 someone intends to deceive or to cheat another or by which  
12 someone intends to deprive another of something of value.

13       In the context of the facts of this case, the phrase "a  
14 scheme or artifice to deprive another of the intangible  
15 right of honest services" means that you, as a vendor doing  
16 business with Arch Coal, Inc., knew that Arch's employee,  
17 identified in the information as Known Person Three, owed  
18 his employer, Arch Coal, a duty of fiduciary -- or a  
19 fiduciary duty of loyalty; that you intended that he breach  
20 that duty by failing to disclose material matters; and that  
21 you foresaw or reasonably should have foreseen that Arch  
22 Coal might suffer an economic harm as a result of the  
23 breach.

24       The phrase "false or fraudulent pretenses,  
25 representations, omissions, or promises" means a statement,

1 an assertion, or omission which concerns a material or  
2 important fact or a material or important aspect of the  
3 matter in question.

4 A false representation or promise is one that was  
5 either known to be untrue at the time that it was made or  
6 used, or that it was made or used with reckless indifference  
7 as to whether it was, in fact, true or false, and made or  
8 used with the intent to defraud.

9 An "intent to defraud" means to act knowingly and with  
10 the intention or the purpose to deceive or to cheat. An  
11 intent to defraud is accompanied, ordinarily, by a desire or  
12 a purpose to bring about some gain or benefit to oneself or  
13 some other person or by a desire or a purpose to cause some  
14 loss to some person.

15 The phrase "use of the mails" means that the mails  
16 were, in fact, used in some manner to further, or to  
17 advance, or to carry out the scheme to defraud or scheme to  
18 obtain money or property by false or fraudulent pretenses,  
19 representations, omissions, or promises or deprive Arch Coal  
20 of its intangible right to its employee's honest services.

21 An act is done knowingly if done voluntarily and  
22 intentionally and not because of mistake or accident or  
23 other innocent reason.

24 An act is done intentionally if it is done deliberately  
25 and not by accident.

1 Any objections to the elements as I've described them?

2 MS. THOMAS: No, Your Honor.

3 MR. KUENZEL: No, Your Honor.

4 THE COURT: All right. Next I want to go over  
5 with you, Mr. Evans, the maximum and any minimum sentences  
6 you may face as a result of your plea. And that is a  
7 maximum term of imprisonment of five years; a maximum fine  
8 of \$250,000, or twice the gross pecuniary gain or loss  
9 resulting from your conduct, whichever is greater; and a  
10 maximum term of supervised release of three years. A  
11 mandatory special assessment of \$100 would be required.  
12 Restitution could also be ordered if it was -- appeared to  
13 be applicable, as it appears it may be in this case.

14 Next I want to return to our discussion of the Federal  
15 Sentencing Guidelines. They are advisory, meaning they're  
16 not mandatory or don't have to be followed but they'll,  
17 nevertheless, play an important role in your case from here  
18 on out.

19 This Court will consider the factors set forth in 18,  
20 U.S.C., Section 3553(a), including the advisory guidelines,  
21 in determining the appropriate sentence in your case.

22 I now want to ask you some questions that will help me  
23 understand your understanding of the advisory guidelines.  
24 Have you discussed with your attorney the various factors  
25 which apply in determining what the sentence in your case

1     may be under the advisory guidelines?

2             THE DEFENDANT:   Yes, Your Honor.

3             THE COURT:   And do you understand that on this  
4     information you cannot, in any event, receive a greater  
5     sentence than the statutory maximum that I explained to you  
6     a moment ago?

7             THE DEFENDANT:   Yes, Your Honor.

8             THE COURT:   Do you understand that the Court will  
9     not determine the sentence for your case until a later date  
10    when a Pre-Sentence Report has been completed and both you  
11    and the Government have had an opportunity to challenge the  
12    facts and analysis reported by the probation officer?

13            THE DEFENDANT:   Yes, Your Honor.

14            THE COURT:   Do you also understand that under a  
15    concept known as relevant conduct this Court, in determining  
16    the Total Offense Level for sentencing purposes under the  
17    guidelines, may take into account any conduct,  
18    circumstances, or injuries relevant to the crime of which  
19    you may be convicted?

20            THE DEFENDANT:   Yes, Your Honor.

21            THE COURT:   Do you understand that after the Court  
22    has determined what advisory guidelines apply to your case,  
23    the Court has the authority to vary or depart from the  
24    advisory guidelines and impose a sentence that is more  
25    severe or less severe than the sentence called for by the



1 guidelines?

2 THE DEFENDANT: Yes, Your Honor.

3 THE COURT: Do you understand, then, in  
4 determining your sentence, the Court is obligated to  
5 calculate the applicable sentencing guideline range and to  
6 consider that range, possible departures under the  
7 guidelines, and other sentencing factors under 18, U.S.C.,  
8 Section 3553(a)?

9 THE DEFENDANT: Yes, Your Honor.

10 THE COURT: Do you understand that parole has been  
11 abolished and if you're sentenced to prison, you'll not be  
12 released on parole?

13 THE DEFENDANT: Yes, Your Honor.

14 THE COURT: Do you understand if the Court accepts  
15 your plea of guilty and the sentence ultimately imposed upon  
16 you is more severe than you had hoped for or expected, you  
17 will still be bound by your guilty plea and would have no  
18 right to withdraw it?

19 THE DEFENDANT: Yes, Your Honor.

20 THE COURT: Do you understand if you plead guilty  
21 to this single-count information which charges you with a  
22 felony, you may lose important civil rights such as the  
23 right to vote, the right to serve on a jury, the right to  
24 hold public office, and the right to own or possess a  
25 firearm?

1           THE DEFENDANT: Yes, Your Honor.

2           THE COURT: All right. Mr. Evans, you have the  
3 right to have the charge contained in the information  
4 presented to a federal grand jury. And I want to explain  
5 that process to you.

6           A grand jury is composed of at least 16 and not more  
7 than 23 persons, and at least 12 grand jurors must find that  
8 there is probable cause to believe that you committed the  
9 crime with which you are charged before you may be indicted.

10          Now, do you see any benefit to you of having this case  
11 presented to a federal grand jury?

12          THE DEFENDANT: No, Your Honor.

13          THE COURT: Do you see any disadvantage or  
14 prejudice to you of not having the case presented to a grand  
15 jury?

16          THE DEFENDANT: No, Your Honor.

17          THE COURT: All right. Your counsel has been  
18 provided with a Waiver of Indictment form. I want to go  
19 over that with you now.

20          It contains what we call the style of the case, *United*  
21 *States of America vs. James H. Evans, III*, the Criminal  
22 Action Number, and it's entitled "Waiver of Indictment" and  
23 it states as follows:

24          "I, James H. Evans, III, am accused of violating 18,  
25 U.S.C., Section 371. I have been advised of the nature of

1 the charges, of the proposed information, and of my rights.  
2 I hereby waive in open court prosecution by indictment and  
3 consent that the proceeding may be by information rather  
4 than by indictment."

5 And there's a space for you to sign and date, a space  
6 for counsel to sign, and a space for me to sign.

7 Now, do you understand what I just read to you?

8 THE DEFENDANT: Yes, Your Honor.

9 THE COURT: Anything about the waiver of  
10 indictment and procedure that you don't understand or you  
11 have questions about?

12 THE DEFENDANT: No, Your Honor.

13 THE COURT: All right. If you're prepared to do  
14 so, then I'll ask that you sign and date the Waiver of  
15 Indictment form. I'll ask your counsel to sign it and  
16 tender it to the Court.

17 (Pause)

18 MR. KUENZEL: May I approach?

19 THE COURT: You may.

20 All right. I'll note for the record that the defendant  
21 has signed and dated the Waiver of Indictment form. It has  
22 been endorsed by his counsel. I am now signing it and I'll  
23 order that it be made a part of the record for this  
24 proceeding.

25 Next, Mr. Evans, I want to talk with you regarding your

1 trial and constitutional rights.

2 You have the right to plead not guilty and maintain a  
3 not guilty plea throughout these proceedings, including at  
4 trial.

5 You have the right to be represented by counsel.

6 You have the right to a speedy and public trial by a  
7 jury composed of citizens of this district.

8 You have the right to confront and have an attorney  
9 cross-examine witnesses and have your attorney move to  
10 suppress any evidence he believes was illegally or  
11 unconstitutionally obtained.

12 You have the right not to testify or otherwise  
13 incriminate yourself and your exercise of this right cannot  
14 be held against you.

15 Do you understand these rights so far?

16 THE DEFENDANT: Yes, Your Honor.

17 THE COURT: You have the right to have the  
18 Government come in here and prove its case beyond a  
19 reasonable doubt. The jury's verdict would have to be  
20 unanimous.

21 You have the right to present evidence on your own  
22 behalf. You have the right to testify on your own behalf at  
23 trial. And you have the right to subpoena witnesses to  
24 testify for you.

25 Do you understand all these rights?

1 THE DEFENDANT: Yes, Your Honor.

2 THE COURT: Any of them you don't understand or  
3 you have questions about?

4 THE DEFENDANT: No, Your Honor.

5 THE COURT: Other than your right to counsel, do  
6 you understand that you'll be giving up all these rights by  
7 entering a plea of guilty?

8 THE DEFENDANT: Yes, Your Honor.

9 THE COURT: Do you understand that once you've  
10 entered a plea of guilty, there's not going to be any trial  
11 and no jury verdict and no finding of innocence or guilt  
12 based on disputed evidence presented to me or to a jury?

13 THE DEFENDANT: Yes, Your Honor.

14 THE COURT: Do you believe that you fully  
15 understand the consequences of entering a plea of guilty?

16 THE DEFENDANT: Yes, Your Honor.

17 THE COURT: Mr. Kuenzel, having reviewed this case  
18 and the plea agreement in detail with your client, do you  
19 believe that the defendant fully understands his rights and  
20 fully understands the consequences of entering a plea of  
21 guilty?

22 MR. KUENZEL: Yes, Your Honor, I do.

23 THE COURT: All right. I note that there is a  
24 Stipulation of Facts. Does counsel have any objection to  
25 the Court considering the Stipulation of Facts in its

1 consideration of the factual basis for the plea?

2 MS. THOMAS: No objection.

3 MR. KUENZEL: No, Your Honor.

4 THE COURT: All right. Very well. I would say  
5 that having looked at the law and the facts in this case  
6 the -- you all might want to in your sentencing memoranda  
7 address -- or maybe before then address the factual basis.  
8 I'm certainly going to defer a factual basis finding. This  
9 seems somewhat complicated. And I'm pretty sure I'm going  
10 to want to hear from the parties on that.

11 Matter of fact, why don't we do this. Why don't you  
12 all file anything on that two weeks in advance of  
13 sentencing. That way, it would be separate from the  
14 sentencing memos.

15 All right. Mr. Evans, will you please stand.

16 As to the charge contained in the single-count  
17 information, how do you plead, sir? Guilty or not guilty?

18 THE DEFENDANT: Guilty, Your Honor.

19 THE COURT: You may be seated.

20 Your counsel has been provided with a written Plea of  
21 Guilty form. I would ask that you go over that with him if  
22 necessary. Sign and date it. Then I'll ask him to sign it  
23 and tender it to the Court.

24 (Pause)

25 MR. KUENZEL: May I approach?

1           THE COURT:   You may.

2           All right.  I'll note for the record that the defendant  
3   has signed and dated the written plea of guilty form.  It  
4   has been witnessed by his counsel.  And I will order that it  
5   be made a part of the record for this proceeding.

6           Mr. Evans, is this plea the result of any threat or  
7   coercion or harassment of you by anyone?

8           THE DEFENDANT:  No, Your Honor.

9           THE COURT:  Is it the result of any promise or  
10   inducement other than those contained in the plea agreement?

11          THE DEFENDANT:  No, Your Honor.

12          THE COURT:  Are you pleading guilty to protect  
13   anyone?

14          THE DEFENDANT:  No, Your Honor.

15          THE COURT:  Are you acting voluntarily and of your  
16   own free will in entering this guilty plea?

17          THE DEFENDANT:  Yes, Your Honor.

18          THE COURT:  Has anyone promised or predicted the  
19   exact sentence which will be imposed in your case?

20          THE DEFENDANT:  No, Your Honor.

21          THE COURT:  Do you understand no one could know at  
22   this time the exact sentence which will be imposed?

23          THE DEFENDANT:  Yes, Your Honor.

24          THE COURT:  Has your attorney adequately  
25   represented you in this matter?

1 THE DEFENDANT: Yes, Your Honor.

2 THE COURT: Has your attorney left anything undone  
3 that you think should have been done?

4 THE DEFENDANT: No, Your Honor.

5 THE COURT: Have you or your attorney found any  
6 defense to the charge contained in the information?

7 THE DEFENDANT: No, Your Honor.

8 THE COURT: Are you, in fact, guilty of the crime  
9 charged in the information? In other words, did you do it?

10 THE DEFENDANT: Yes, Your Honor.

11 THE COURT: All right. I'll find the defendant's  
12 competent and capable of entering an informed plea; that the  
13 plea is freely and voluntarily made; that the defendant  
14 understands the nature of the charges and is aware of the  
15 consequences of the plea. I will find that the defendant  
16 understands his rights and understands that he's giving up  
17 these rights by entering a plea of guilty.

18 I will find that -- I will defer a factual basis  
19 finding, but I will accept the plea of guilty to the  
20 information and will defer adjudging the defendant guilty  
21 until the time of sentencing.

22 I will ask the probation officer to prepare a  
23 Pre-Sentence Investigation Report.

24 Mr. Evans, it's important that you cooperate fully with  
25 the probation officer in the preparation of the Pre-Sentence



1 Report. If you fail to cooperate fully and truthfully with  
2 the probation officer, you could be subject to enhancement  
3 of your sentence or the forfeiture of certain sentence  
4 reductions for which you might otherwise be eligible.

5 It's also important that you not commit any additional  
6 crimes between now and sentencing as there may be additional  
7 punishments imposed for committing additional crimes.

8 I'm going to set this matter for sentencing on  
9 November 17th, 2014, at 2:00 p.m. And I'll put my other  
10 pre-sentence dates in my post-plea order.

11 What's the Government's position with regard to bond?

12 MS. THOMAS: No objection.

13 THE COURT: All right. I will allow the defendant  
14 to be released today on a ten-thousand-dollar unsecured bond  
15 under the standard conditions and those identified in the  
16 Pre-Trial Services order.

17 I've already signed my part of that paperwork.

18 Mr. Kuenzel, you and your client just need to get with  
19 the deputy clerk after the hearing to make sure your part of  
20 the paperwork is completed.

21 Two notes I want to make about that. One is that, Mr.  
22 Evans, you're going to need to surrender your passport. And  
23 you're also going to need to get rid of your guns. So, that  
24 needs to be done immediately if it hasn't been done already.

25 THE DEFENDANT: I've already taken care of that,

1 Your Honor.

2 THE COURT: Very well. Anything else we need to  
3 take care of today?

4 MS. THOMAS: No, Your Honor.

5 MR. KUENZEL: No, Your Honor.

6 THE COURT: All right. Thank you.

7 (Proceedings concluded at 4:00 p.m.)  
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1           I, Lisa A. Cook, Official Reporter of the United  
2 States District Court for the Southern District of West  
3 Virginia, do hereby certify that the foregoing is a true and  
4 correct transcript, to the best of my ability, from the  
5 record of proceedings in the above-entitled matter.

6  
7  
8           s\Lisa A. Cook

August 6, 2014

9           Reporter

Date

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